No. 88-2018

In The

Supreme Court of the United States

October Term, 1989

THE STATE OF ILLINOIS,

Petitioner,

vs.

EDWARD RODRIGUEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District

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I.

THE ILLINOIS APPELLATE COURT HAS MISINTERPRETED THE FOURTH AMENDMENT BY REFUSING TO RECOGNIZE A VALID EXCEPTION TO THE WARRANT REQUIREMENT WHEN A POLICE OFFICER, IN GOOD FAITH, RELIES ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT A CONSENSUAL ENTRY. IN THE ALTERNATIVE, THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY IF THE WARRANT REQUIREMENT IS NOT EXCUSED.

A.

An Entry Or Search Is Reasonable, And Therefore Constitutional, When It Is Performed With The Consent Of A Person Who Reasonably Appears, On The Basis Of All The Information Known To The Police, To Have Authority To Give That Consent.

(Reply To Respondent's Issues III and IV and Issue I Raised By *Amicus*).

In reaching Fourth Amendment determinations, this Court has been guided at all times by reasonableness. "Our fundamental inquiry concerning Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances." *United States v. Chadwick*, 433 U.S. 1, 9 (1977). Throughout the past two centuries, this Court has always favored reasonable conduct on the part of police officers. In this case, the police went to arrest a man who had beaten his girlfriend and broken her jaw. They reasonably believed she had the authority to allow the entry into the apartment where the beating occurred. Respondent and *amicus*[1] expressly ask this Court to condemn the actions of the police officers who reasonably relied on the facts and circumstances presented to them. Such reasonable reliance is the

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[1] *Amicus* here refers to the National Association of Criminal Defense Lawyers, the only organization to file a brief *amicus curiae* in support of respondent's position.

essence of the apparent authority doctrine. Since the officers reasonably believed they were acting under an established exception to the warrant requirement, and since the information known to them indicated that their entry into the apartment was lawful, their search was both reasonable and constitutional under the Fourth Amendment.

In response to petitioner's argument, respondent and *amicus* have chosen to focus on different considerations. *Amicus* takes the extreme position that the information known to the officers at the time they entered the apartment is irrelevant. *amicus* argues that only consent from someone with actual authority can justify an entry or search, and that consent from a person with only apparent authority should always be rejected. While respondent joins this argument, he fails to give this Court any substantive legal analysis in support of this position, and instead simply stresses that the officers did not in fact possess a reasonable belief that Gale Fisher had the requisite authority to let them into the apartment. By failing to adequately challenge the theoretical bases of the apparent authority doctrine, respondent's brief is most unpersuasive.

(1)

The Legality Of An Entry Or Search Conducted Under An Exception To The Warrant Requirement Must Be Determined By The Information Available To The Police When The Search Is Made.

Amicus argues that no matter how valid a consent to enter appears to be, it may be unconstitutional for the police to rely on it. It is also the position of *amicus* that encouraging police officers to seek consents would violate privacy interests protected by the Fourth Amendment. Respondent makes a cursory statement to the same effect. These arguments are not supported by any precedent from this Court. They should be rejected for the following reasons:

1. This Court has repeatedly held that in situations where a warrantless search is permissible, its legality will be determined by the information available to the police at the time.

2. Searches with consent are perfectly constitutional and infringe on privacy rights less than many other kinds of searches.

Searches performed with consent are a well established and perfectly constitutional exception to the warrant requirement. *United States v. Matlock*, 415 U.S. 164 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Amicus*, however, takes the absolutist position that a valid consent must come from someone with actual authority, and that consent from someone with only apparent authority should not be countenanced by the Fourth Amendment, no matter how valid it appears to be. That position is untenable because it would make the legality of all consensual entries or searches depend, not on the facts and circumstances known at the time, but on facts which might not be known until months or years later. Also, that position is contrary to the rule of law followed by this Court in other kinds of warrantless searches which are recognized as exceptions to the warrant requirement. The general rule is that the legality of a warrantless search is determined by the information available when the search is performed. It follows that if the police reasonably believe that they have received a valid consent to enter or search, then that entry or search is lawful.

For example, this Court has held that the legality of a search incident to arrest is to be determined by the information available to the police at the time. If the police have information showing probable cause to arrest, it does not matter if that information later turns out to be false. *Hill v. California*, 401 U.S. 797 (1971). In *Hill*, the officers mistakenly but reasonably arrested the wrong man. This Court held that the search incident to the mistaken arrest was constitutional.

Respondent attempts to circumvent the precedent of *Hill* by categorizing the reasonable mistake on the part of the officers as "unavoidable." (Resp. Br. 25) Nowhere in *Hill* is the concept of "unavoidability" discussed. The main focus of both *Hill* and *Maryland v. Garrison*, 480 U.S. 79 (1987) was that when police officers reasonably rely on the facts and circumstances presented to them, even if their assessment of

those facts later turns out to be incorrect, their conduct is not proscribed by the Fourth Amendment. In fact, in *Hill*, the mistake which resulted in a warrantless arrest was not necessarily unavoidable. Indeed, arrestee Miller specifically told the officers he was not Mr. Hill, the resident of the dwelling. Nevertheless, based on all the facts presented to the officers, their mistake in arresting Miller was reasonable.

Amicus does not join respondent in this "unavoidability" analysis, but simply emphasizes that Hill's arrest was based on probable cause. This fact does not distinguish *Hill* from the instant case; the police unquestionably had probable cause to arrest respondent for aggravated battery. The attempt to distinguish *Garrison* based upon the presence of a warrant is also tenuous. It should be noted that in *Garrison* no warrant actually authorized the search performed by the police officers. Rather, this Court held that the search was justified by the reasonable belief of the officers that a warrant, which actually was for different premises, authorized the search in question.

Another exception to the warrant requirement involves searches of automobiles. *Chambers v. Maroney*, 399 U.S. 42 (1970). This Court has ruled that the legality of a warrantless search of an automobile is to be determined by the facts known to the police at the time they searched the vehicle. *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, the police saw a hunting knife in a car and then searched for more weapons. There were no other weapons in the automobile, but some marijuana was found. This Court found the search to be constitutional.

Another exception to the warrant requirement is a "stop and frisk" based on a reasonable suspicion that the subject is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1 (1968). This Court has made it very clear that the legality of a pat-down search after a *Terry* stop is to be judged according to the facts known to the officer at the time of the stop. *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Cortez*, 449 U.S. 411 (1981).

In the recent *Buie* case this Court held that a warrantless "protective sweep," designed for protection of law enforcement officers after an arrest, is justified by the apparent danger to the officers rather than by facts that become known after the search is complete. *Maryland v. Buie*, ___ U.S. ___ (No. 88-1369, February 28, 1990).

Thus the general test applied under a recognized exception to the warrant requirement is that the legality of the search will be determined by the information known to the police at the time of the search, whether that information later turns out to be true or false. *Amicus* argues that it would violate the Fourth Amendment to follow the same rule in cases involving a consent to search or enter. That argument is without merit.

In fact the position taken by *amicus* is fundamentally unsound in that it would turn the question of the legality of a search or entry based on consent into a guessing game. *Amicus* argues that, even when the police believe reasonably and in good faith that they have a valid consent to enter, the entry must be ruled illegal if it turns out later that the consent was given by someone with apparent rather than actual authority. Police officers, however, are entitled to know whether they are complying with the Fourth Amendment or not. Any Fourth Amendment ruling by this Court should be one which the police are able to follow in practice. Therefore, this Court should hold that a search or entry based on consent is valid if the police, relying on the objective facts and circumstances known to them at the time, reasonably believe that they have a valid consent to search or enter.

Amicus argues that this rule would erode privacy rights protected by the Fourth Amendment. It is well-established that the reasonableness of a particular practice is determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). If this Court were to accept respondent's arguments and reject the doctrine of apparent authority, this would chill the use of consensual searches by law enforcement officers who would not be able to confidently rely

on the totality of the facts and circumstances presented to them at the time. In *Schneckloth*, this Court recognized the important and overriding governmental interest in protecting its own citizenry through the investigation of crime.[2] To this end, this Court recognized the importance and need for consent searches as an effective tool of law enforcement. Indeed, this Court noted that in some situations, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *supra* at 227.

In fact, a search with consent is a lesser invasion of privacy than many other kinds of searches. When the police seek a consent to search, they give notice to some person having authority over the premises and they give that person an opportunity to refuse consent. Most other searches by police officers involve neither notice nor an opportunity to refuse. Furthermore, in *Hill, supra*, Mr. Hill's privacy rights were affected by the search of his residence which was incident to Mr. Miller's arrest. Nevertheless, as in *Hill*, reasonable police conduct, on balance, outweighed any minor intrusion of respondent's privacy rights.

Respondent's argument is premised on a theory of waiver, which was specifically rejected by this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The argument is as unpersuasive now as it was some two decades ago when Justice Stewart, writing for the majority, stated: "Similarly, a 'waiver' approach to consent searches would be thoroughly inconsistent with our decisions that have approved 'third party consents.'" *Schneckloth supra*, at 245.[3]

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[2] "If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short a search pursuant to consent may result in considerably less inconvenience for the subject of the search." *Schneckloth, supra* at 228.

[3] The reasoning behind the Court's rejection of a waiver analysis in the area of the Fourth Amendment and specifically regarding consent searches was due to the fact that the ". . . Fourth Amendment stands as a

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Respondent also attempts to persuade this Court that it should not adopt an apparent authority to consent doctrine because it would not comport with concepts of agency law. Respondent's argument is gleaned from this Court's decision in *Stoner v. California*, 376 U.S. 483 (1964). Such reliance is misplaced.

In *Stoner*, this Court held that a person who occupies a hotel room does not grant authority to a hotel clerk to let the police into that room. The officers were aware that the third party giving consent was not authorized by the occupant to give such consent. Thus, *Stoner* dealt solely with the question of actual authority and did not decide or discuss the question of whether a search may be justified by consent from a person with apparent authority.[4]

In sum, when an exception to the warrant requirement applies, this Court has looked to the information available to the police at the time of the search in determining whether that search is reasonable under the Fourth Amendment. The same rule should be followed when a search or entry is based on consent. Any Fourth Amendment rule should be one which the police are able to follow, and searches should not be ruled invalid because of facts which become known long after the search has been performed. A rejection of this rule would have a chilling effect on the use of consensual searches which

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protection of quite different constitutional values." *Schneckloth* at 241-242. While the court recognized the propriety of such analysis in the context of a defendant's right to a fair trial the court stated " . . . it would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege . . . " *supra* at 246.

[4] See R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, 2nd Ed., Vol. 3, (1987), page 262, fn. 96 wherein Professor LaFave states that, "*Stoner* involved a mistake of law rather than a mistake of fact, which does not come within the apparent authority doctrine."

are a significant and integral part of effective law enforcement. Therefore, when police officers reasonably rely on objective facts and circumstances which indicate that they have obtained a valid consent to search or enter then that search or entry is valid under the Fourth Amendment.

(2)

Officers Entress and Gutierrez Were Right To Act Promptly To Protect A Victim Of Domestic Violence, And The Record Shows That They Reasonably Believed That The Victim Had Authority To Let Them Into The Apartment Where She Had Been Injured.

Respondent argues that the Chicago police officers who arrested him did not have a reasonable belief that Gale Fisher had authority to permit entry into the California Avenue.

The basic question before this Court is whether, as a matter of law, a search or entry is proper under the Fourth Amendment when the police reasonably believe that they have searched or entered with valid consent. Although the usual function of this Court is to rule on principles of law, not on particular facts, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), the facts of this case underscore the necessity for adoption of the apparent authority to consent doctrine.

The actions of Officers Entress and Guiterrez were not only proper, but highly commendable. They acted promptly and effectively on a complaint of serious domestic violence. Furthermore, the record shows that those officers reasonably believed that Gale Fisher had authority to let them into the apartment where her jaw had been broken.

When Officers Entress and Gutierrez talked to Gale Fisher at her mother's home, Ms. Fisher obviously had been beaten up. (J. App. 32) She had a black eye, a swollen jawbone sticking out to the side, a distorted face, bruises on her neck and, although this was not known until later, her jaw had been broken. (J. App. 32, 46, 73) Like many victims of domestic violence, she was somewhat reluctant to press charges. (J. App. 22) It is a reasonable inference that she was upset and emotional. The officers believed that they were

dealing with a serious felony. In fact, they later asked that charges of aggravated battery be approved against respondent. (J. App. 32-33) Ill. Rev. Stat. 1985, ch. 38, sec. 12-4(a).

The officers knew that Gale Fisher had been beaten up by her boyfriend in the apartment at 3519 South California, that all or most of her personal possessions were there, that she had a key to the apartment and that she called it "our apartment." The only reasonable conclusion from that information was that she had authority to allow entry.

Respondent argues that Officers Entress and Gutierrez were required to cross-examine Gale Fisher about her living arrangements. It would not have been proper or feasible to treat a severely beaten victim in that fashion. In the world of real crimes and real people the police must often get information from victims who are in fear, injured, inarticulate or hysterical. A reasonable warrantless search does not require questioning victims of violent crimes as if they were hostile witnesses in a courtroom.

Nevertheless, complete information about Gale Fisher's living arrangements would have shown that during the eight months before respondent's arrest she had been in the apartment at 3519 South California almost every day with respondent's consent and approval. From December, 1984 to July 1, 1985 she lived there and after July 1 she was there virtually every day and many nights as well. (J. App. 55, 73) Thus, respondent is incorrect in his claim that more investigation would have easily resolved the question of whether Gale Fisher had actual authority to let the officers into the apartment. That question has been litigated in this case for the last five years and illustrates the fallacy of defendant's argument and the inherent difficulty of evaluating actual authority. On July 26, 1985, however, the information known by the officers indicated that Gale Fisher had authority to open the apartment door and let them in.

Officers Entress and Gutierrez had a severely beaten victim to protect and did not have five years to decide what to do. The point of maximum risk for a victim of domestic violence is when she defies her abuser and tries to break away

from him. *Handbook for Domestic Violence Victims* (Springfield, Ill: Illinois Coalition Against Domestic Violence, 1986), pp. 5-6; *See* NiCarthy, Ginny, *The Ones Who Got Away: Women Who Left Abusive Partners* (Seattle: The Seal Press, 1987). Officers Entress and Gutierrez did exactly what every police officer should do in serious domestic violence cases, which is to promptly arrest the offender.

After Gale Fisher became a potential witness against respondent he attacked her again, breaking her cheekbone in four places. (J. App. 81-82) It was only then that Ms. Fisher went to respondent's lawyer's office and signed an affidavit claiming for the first time that she had lacked actual authority to let the police into the apartment. (J. App. 84-85) But the information known to the police on July 26, 1985 clearly indicated that Gale Fisher had the right to let them into the apartment where respondent had broken her jaw a short time before.

Respondent argues that the officers used the arrest as a pretext to search for drugs, but that argument is factually false and legally irrelevant. Respondent asserts, with no support in the record, that Tactical Unit Officers like Entress and Gutierrez were primarily narcotics investigators. (Resp. Br. 39) That is a regrettable misstatement of fact, since Tactical Units have general law enforcement responsibilities and do not specialize in narcotics cases.[5] The Chicago Police Department, of course, has a narcotics division, but that unit was not involved in this case in any way.

However, even if the arresting officers had intended to look for narcotics, the entry into the apartment would still have been perfectly proper under the law as stated by this

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[5] In 1985 the duties of Tactical Units were governed by Chicago Police Department Patrol Division Special Order 79-11 (1979). That order said: "Tactical units have been created to provide district commanders with flexibility in the assignment of personnel in dealing with special problems, and to expand and extend patrol operations. They are not to be considered citizen's dress officers or follow up investigators, and the activities of tactical teams are to be directed toward the patrol mission of protection of property and the prevention of crime."

Court. *United States v. Robinson*, 414 U.S. 218 (1973). It is undisputed that the drugs in respondent's apartment were in plain view and were first observed within 30 to 90 seconds after the police entered. (J. App. 18, 27-28) In *Robinson*, a criminal defendant argued that a traffic arrest had been a pretext to search for narcotics. This Court held that as long as there was probable cause to arrest and the arrest was normal police practice, the defendant's argument about a pretextual arrest could be disregarded. *Robinson*, 414 U.S. at 221 n. 1. In a case of serious domestic violence, Chicago Police Department policy requires an "immediate arrest." *Chicago Police Department Training Bulletin*, Vol. 29, no. 7 (May 9, 1988).[6]

Respondent also argues under agency law that Gale Fisher lacked apparent authority from respondent to allow entry into the apartment. (Resp. Br. 22-24) That argument is irrelevant because agency law has nothing to do with this case. Rather the question is whether under the Fourth Amendment the officers reasonably concluded that they had a valid consent to enter. However, Gale Fisher had lived in the apartment from December until July with respondent's consent and approval. During July she was in the apartment almost every day and many nights, also with respondent's consent and approval. Thus even under agency law it is likely that respondent had given her apparent authority to let people into the apartment. *American Society of Mechanical Engineers v. Hydrolevel Corporation*, 456 U.S. 556 (1982).

It is far more important that all the facts known to the officers on July 26, 1985 indicated that Gale Fisher had

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[6] Respondent claims that under Ill. Rev. Stat., 1985, ch. 38, sec. 107-11 and 107-12, "the police could have obtained a summons signed by a judge or a notice to appear signed by a police officer issuing the notice to appear and mailed either of those documents to respondent commanding him to appear in court on a certain date and time." (Resp. Br. 27) However, under Chicago Police Department General Order No. 82-8 a summons should only be issued when the offense is a petty offense or a Class C misdemeanor and it may never be issued when there is a reasonable likelihood that the offense will continue or recur or that life or property will be endangered if the offender is not arrested.

authority to let them into the apartment where respondent had broken her jaw. Officers Entress and Gutierrez knew that Gale Fisher had a key to that apartment. They knew that most or all of her personal property was there. They knew that she referred to the residence as "our apartment." Any reasonable person would have concluded from this information that Gale Fisher lived in the apartment or at least had constant access to it and control over it. Any police officer performing his duty would have acted promptly under these circumstances to arrest the man who had just committed a serious act of domestic violence.[7] Since the officers acted reasonably, the arrest and search were lawful under the Fourth Amendment.

B

If This Court Does Not Recognize Apparent Authority As An Exception To The Warrant Requirement, Where There Is No Police Misconduct And No Possibility Of Deterring Future Police Misconduct, Competent And Relevant Evidence Should Not Be Subjected To The Strictures Of the Judicially Created Rule Of Exclusion And The Good Faith Exception To The Exclusionary Rule Should Be Applied.

(Reply to Respondent's Issue V
and to Issue II Raised by Amicus)

Respondent stands alone in asserting that "this Court has never announced any 'good faith exception to the exclusionary rule,' " (Resp. Br. 41) and boldly condemns commentators "who should know better." (Resp. Br. 42) *Amicus* admits however, as it must, that a "good faith" exception to the exclusionary rule does exist. *Illinois v. Krull*, 480 U.S. 340

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[7] Although respondent argues that the officers had time to secure a warrant, it should be noted that the dissent in *Matlock* urged that the consent search in that case was unconstitutional because the police did not seek a warrant, even though there was time and opportunity to do so. 415 U.S. at 178-188 (Douglas, J. dissenting) The majority did not adopt such a principle. Since the officers here believed they were acting under a valid exception to the warrant requirement, they would not have interrupted their investigation and expended time to secure a warrant.

(1987); *United States v. Leon*, 468 U.S. 897 (1984). Nevertheless, it is claimed that this exception should apply only when a search is authorized by an invalid warrant or statute, and not when police officers reasonably believe the entry or search to be lawful.

This argument is contrary to the policy behind the exclusionary rule. The primary purpose of the exclusionary rule is to deter police misconduct. *United States v. Janis*, 428 U.S. 433, 446 (1976). When police officers conduct a search with what they reasonably believe is valid consent based on the objective facts and circumstances presented to them, there is no police misconduct and no possibility of deterrence. A secondary purpose of the exclusionary rule is to promote the integrity of the judicial system by excluding evidence unlawfully obtained by the police. *United States v. Peltier*, 422 U.S. 531, 536-540 (1975). However, the integrity of the judicial system would certainly not be promoted by the exclusion of relevant evidence which was obtained by what the police reasonably believed were lawful means.

While the presence of a neutral magistrate in *Leon* was a significant fact, petitioner submits it did not represent the underlying basis of the "good faith exception" to the exclusionary rule. The underlying rationale is clear: Competent and relevant evidence should not be subjected to the strictures of the judicially created rule of exclusion, where its deterrent purpose would not be served by this sanction. The main focus of the *Leon* decision was on the conduct of the police officers who acted in objective good faith reliance on the facts presented to them.

Respondent and *amicus* allege that to extend *Leon* and *Krull* and apply a reasonable good faith belief exception to the exclusionary rule in this case would, in essence, make police officers the judges of their own conduct. That assertion is patently false. While there is no magistrate or legislature present in this case prior to the search, the decisionmakers in reality are the courts, because the validity of a search based on consent is always subject to later review by the courts. Police officers could not simply claim that they reasonably believed they had a valid consent to search or enter, they

would have to prove that claim at a hearing on a motion to suppress evidence. Petitioner asks only that the police be given a chance to prove in court that they reasonably believed they had a valid consent before beginning a search.

Amicus argues that allowing an exception to the exclusionary rule here would encourage police misconduct by allowing officers to falsely claim that they reasonably believed that a search was based on a valid consent. However, judges routinely determine whether the police acted reasonably based on the information available to them. At a hearing on a motion to suppress evidence, the possibility of judicial error is no greater when the search was based on consent than it is when the search was incident to an arrest or authorized by a warrant. See *Franks v. Delaware*, 438 U.S. 154 (1978). Officers will know that their conduct in obtaining a consent to search can later be challenged in court.

There is simply no reason for this Court to deter the police from attempting to obtain consents to search. Searches based on consent are constitutionally valid and do not infringe on any legitimate expectation of privacy. *United States v. Matlock*, 415 U.S. 164 (1974). In fact in some ways searches with consent infringe on privacy rights to a lesser extent than other kinds of searches. In a consensual search, notice is given that a search will take place and someone having authority over the premises has an opportunity to decide whether to grant or refuse permission to search. Notice and an opportunity to refuse are not present in other kinds of searches. Application of the exclusionary rule in this case would, however, serve to chill the use of all consensual searches by law enforcement officers. (See Brief for the United States as Amicus Curiae Supporting Petitioner, pp. 14-15).

Respondent and *amicus* argue as if this Court was being urged to allow an exception to the exclusionary rule which would apply when officers acted with subjective good faith. That is just not so. Petitioner asks this Court to adopt, not a "subjective good faith" exception to the exclusionary rule, but rather an "objectively reasonable belief" exception. As this Court has said, " . . . the standard of reasonableness we adopt

is an objective one; the standard does not turn on the subjective good faith of individual officers." *Illinois v. Krull*, 480 U.S. 340, 355 (1987). The exclusionary rule should not apply when officers search with what they believe to be a valid consent and that belief is objectively reasonable on the basis of the information available to them. That standard will allow for effective judicial review of the actions of police officers.[8]

II

WHERE GALE FISHER REFERRED TO THE APARTMENT AT 3519 SOUTH CALIFORNIA AVENUE AS HER APARTMENT, RETAINED POSSESSION OF A KEY TO SUCH APARTMENT WHICH SHE TERMED HER KEY, AND KEPT ALL HER POSSESSIONS EXCEPT THREE BAGS OF CLOTHING AT THE APARTMENT, THE ILLINOIS APPELLATE COURT MISINTERPRETED *UNITED STATES v. MATLOCK* BY FINDING THAT GALE LACKED COMMON AUTHORITY TO PERMIT A CONSENSUAL ENTRY.

(Reply To Respondent's Issue I)

During the eight months before petitioner was arrested, Gale Fisher was in the apartment at 3519 South California almost every day with respondent's consent and approval. Nevertheless, respondent now argues that she lacked actual authority to permit entry into that apartment. Gale Fisher had that authority, however, from December, 1984 until July 26, 1985 since she shared that apartment with respondent.

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[8] While amicus correctly notes that some federal courts have rejected the application of *Leon's* good faith exception to non-warrant searches, (See Brief for A-C at 22). Amicus fails to mention that there are federal courts which have applied the good faith exception to non-warrant searches. *United States v. Mourning*, 716 F.Supp. 279 (W.D. Tex. 1989), wherein the Court relied on *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc) and specifically applied the good faith exception to prevent exclusion of evidence seized in a warrantless consent search. See *United States v. Ortiz*, 714 F.Supp. 1569 (C.D. Cal. 1989).

Before July 1, 1985, Gale Fisher lived in the apartment with respondent, so there is no doubt that during that period she had actual authority to allow entry. After July 1, Gale Fisher never completely moved out. She left most of her possessions in the apartment and planned to return there after her child was toilet trained. (J. App. 40-41) She was in the apartment virtually every day and many nights, sometimes spending the entire night there. (J. App. 55, 73) Thus Gale Fisher never lost the access and control that gave her actual authority to allow entry to the apartment.[9]

Respondent argues that Gale Fisher was not his wife, nor was she the lessee of the apartment at 3519 South California. However, exactly the same situation existed in the *Matlock* case, in which this Court upheld a consent to search given by a woman who was neither the wife of the respondent nor the lessee of the apartment. *United States v. Matlock*, 415 U.S. 164 (1974). Therefore, as in *Matlock*, Gale Fisher had actual authority to give a valid consent to enter.

III

THIS COURT HAS JURISDICTION SINCE THE LOWER COURT DECISION WAS BASED SOLELY ON THE UNITED STATES CONSTITUTION, AND IN FACT NO COURT HAS EVER DECIDED THE ISSUE IN THIS MATTER IN A CASE ARISING UNDER THE CURRENT CONSTITUTION OF THE STATE OF ILLINOIS.

(Reply to Respondent's Issue II)

Respondent asserts that the lower court decided this case under the Illinois Constitution and this Court accordingly lacks jurisdiction. The opinion of the Appellate Court of Illinois clearly belies this allegation and affirmatively demonstrates that this case was decided solely under precedents from this and other courts applying the Fourth Amendment to the United States Constitution.

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[9] The fact that the trial judge was unable to resolve the conflict in testimony regarding how Gale Fisher came to possess the key to the apartment, underscores the need for an apparent authority test.

The Illinois Appellate Court's opinion here did not cite any Illinois constitutional provision or statute, nor did it cite any case applying any Illinois constitutional provision or statute. In fact no court has ever decided a case under the current Illinois Constitution on the legality of a search performed with the permission of someone having apparent authority to consent. Since the Illinois Appellate Court decided this case solely under the Fourth Amendment, this Court has jurisdiction to review the matter. 28 U.S.C. § 1257(3).

Initially, petitioner would point out that respondent never mentioned the Illinois Constitution in either the trial court or the Appellate Court. In the trial court, respondent's motion to suppress evidence and his argument to the trial judge made no mention of the Illinois Constitution. (Trial Court Record 104-110, 124-129, 178) In the Illinois Appellate Court respondent cited the Fourth Amendment, three decisions of this Court and four other federal court decisions, but never mentioned any Illinois constitutional provision or statute. (Ill. App. Ct., Brief for Defendant-Appellee, pp. ii, 8) It is inappropriate for respondent to make an argument for the first time in this Court when he never made that argument in state court. *Illinois v. Gates*, 462 U.S. 213 (1983). Moreover, it is highly improbable that the Appellate Court of Illinois would have decided this case on grounds which were never raised by respondent or discussed by the lower court.

The opinion of the Appellate Court of Illinois unquestionably indicates that this case was decided by that court solely on federal constitutional grounds. The court cited only cases applying the Fourth Amendment and did not cite any case applying any Illinois constitutional provision or statute. The only precedent discussed at length by the Illinois Appellate Court, and the only case quoted in the opinion below, is this Court's opinion in *Matlock*. *United States v. Matlock*, 415 U.S. 164 (1974). It is true, as respondent points out, that *Matlock* did not resolve the precise issue in this case. 415 U.S. at 177 n. 14. However, the fact that the Illinois Appellate Court announced that it was guided by the *Matlock* decision and indeed quoted extensively from it, establishes that this

case was decided under the Fourth Amendment and not under any other provision.

The Appellate Court of Illinois also cited six Illinois precedents in its opinion, but all of those precedents are Fourth Amendment decisions. (J. App. 103) Each of those six precedents cites the Fourth Amendment, or key Fourth Amendment decisions of this Court, or both. *None* of those precedents cited by the Illinois Appellate Court so much as mentions the Illinois Constitution. Since all of the precedents relied upon by the Illinois Appellate Court were Fourth Amendment decisions, and since that court did not cite the Illinois Constitution or any case based on that constitution, it is clear that the lower court opinion here was based solely on the Fourth Amendment.[10]

Respondent seems to believe that if there are Illinois precedents on searches based on consent by persons with apparent authority, then those precedents must be based on independent state law grounds. That is just not so. The Illinois courts can and must enforce the United States Constitution. U.S. Const., Art. VI. When state courts decide federal constitutional issues, then this Court has jurisdiction to review those decisions. U.S. Const., Art. III, sec. 2; 28 U.S.C. § 1257(3). When considering the issue in this matter the Illinois courts have always relied on the Fourth Amendment and have never relied on the current Illinois Constitution. Therefore, this Court has jurisdiction to review the Fourth Amendment decision in this case.

Petitioner also asserts that the trial judge in this case, when granting the motion to suppress evidence, made his decision on state law grounds. That is not true and it would not matter even if it were true, since it is the decision of the

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[10] Those six state precedents cited by the Illinois Appellate Court were *People v. Stacey*, 58 Ill. 2d 83, 317 N.E.2d 24 (1974); *People v. Vought*, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (2d Dist. 1988); *People v. Callaway*, 167 Ill. App. 3d 872, 522 N.E.2d 337 (5th Dist. 1988); *People v Daugherty*, 161 Ill. App. 3d 394, 514 N.E.2d 228 (2d Dist. 1987); *People v. Posey*, 99 Ill. App. 3d 943, 426 N.E.2d 209 (5th Dist. 1981); *People v. Bochniak*, 93 Ill. App. 3d 575, 417 N.E.2d 722 (1st Dist. 1981).

Illinois Appellate Court which is being reviewed here. 28 U.S.C. sec. 1257(3). In his findings the trial judge did not mention the Illinois Constitution or any precedent based on the Illinois Constitution. But Judge Schreier did cite the *Miller* decision as "controlling," and *Miller* is explicitly based on the Fourth Amendment and does not cite any Illinois constitutional provision or statute. *People v. Miller*, 40 Ill. 2d 154, 238 N.E.2d 407 (1968). (J. App. 93)

In fact, respondent tacitly concedes that none of the recent Illinois decisions dealing with the issue in this case rely on any state constitutional provision. (Resp. Br. 18-19, n. 11) Respondent does, however, rely on the *Shambley* case from 1954 as establishing a rule based on the Illinois Constitution governing searches with consent from persons with apparent authority. *People v. Shambley*, 4 Ill. 2d 38, 122 N.E.2d 172 (1954) (partially overruled on other grounds, *People v. Nunn*, 59 Ill. 2d 344, 349, 304 N.E.2d 81 (1973)). *Shambley* does no such thing. For three reasons the *Shambley* decision has no application to this case: (1) it says nothing about searches authorized by a person with apparent authority to consent, (2) it was decided on the basis of an Illinois constitutional provision which was superceded 20 years ago, and (3) it was never cited or relied upon by any judge or litigant during proceedings in the Illinois courts in this case.[11]

This Court has held that respondent, in order to succeed with his independent and adequate state grounds argument, must show some "plain statement" by the lower court that it decided the case on the basis of state law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Respondent has not even attempted to meet his burden under *Long*. There is no statement in the opinion of the Appellate Court of Illinois, plain or otherwise, that it was deciding the case on the basis of the Illinois Constitution. On the contrary, that opinion does not refer to the Illinois Constitution or to any other provision of state law, nor does it cite any precedent decided on state law grounds. Therefore, under *Long* this Court " . . . will accept as

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[11] See Ill. Const. 1970, Art. I, sec. 6; Ill. Const. 1870, Art. II, sec. 6

the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1041. *Accord: New York v. Class*, 475 U.S. 106, 109-110 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 326-328 (1985).

CONCLUSION

For the reasons stated above and in their principal brief, petitioner respectfully requests that this Honorable Court reverse the judgment of the Appellate Court of Illinois, First District, and remand the matter to the Illinois courts for further proceedings.

Respectfully Submitted

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